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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., and New York City Police Officers Michael Bonenfant, NYPD Officer; Paul Chiaramonte, NYC Police Officer; Michael Miller, NYC Police Officer; Kevin Murphy, NYC Police Officer; Paul Polito, NYC Police Officer; Paul Sanzone, NYC Police Officer; Thomas Sheehan, NYC Police Officer; David Turnof, NYC Police Officer; M. Wnorowski, NYC Police Officer,

Petitioners,

—against—

RAYMOND W. KELLY, as Police Commissioner of the Police Department of the City of New York and the POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Courts below erred in dismissing Petitioners' action, in that the motive for their discipline was the exercise of their First Amendment rights in demonstrating against the then Mayor's administration of the Police Department, rather than the minor traffic infraction which was stated by the administrative agency to be the basis for their discipline.

Petitioners contend that this question should be answered in the affirmative.

2. Whether the District Court below erred in failing to apply the Pickering-Connick test to determine whether the First Amendment rights of the Petitioners outweighed the interest of the Respondents to maintain an efficient police force.

Petitioners contend that this question should be answered in the affirmative.

3. Whether the Courts below failed to take proper account of the fact that Petitioners were off-duty at the time of the incident in question, and that while off-duty, they are entitled to enjoy the same rights under the First Amendment as any other citizen, including the right to engage in "symbolic speech."

Petitioners contend that this question should be answered in the affirmative.

4. Whether Respondents violated Petitioners' rights to equal protection under the Fourteenth Amendment, by disciplining them for off-duty activities under circumstances in which persons other than police officers would not have been punished at all, or at most, could have been subjected to a fine amounting to less than 5% of the penalty imposed on Petitioners.

Petitioners contend that this question should be answered in the affirmative.

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THOMAS SHEEHAN, DAVID TURNOF, AND M. WNOROWSKI (hereinafter "Petitioners") respectfully petition this Court to issue a writ of certiorari to review an Order of the United States Court of Appeals for the Second Circuit, dated September 22, 1995, which affirmed an order of the United States District Court, Southern District of New York, (Hon. PETER K. LEISURE U.S.D.J.), dated July 13, 1994, which dismissed the claims of Petitioners in response to a motion for partial Summary Judgment brought by Respondents.

Thereafter, a Stipulation and Order of voluntary dismissal on behalf of the remaining New York City Police Officers who were petitioners in the original proceeding was signed by the District Court below on or about November 4, 1994, which was entered on November 10, 1994. Accordingly, the petitioners in the original proceeding, Nicholas Abate, Nicholas Arniotes, Jack Bowden, James Boyle, Robert Casaburi, Paul Ciorra, Lawrence Cohen, Roberta Corrigan, Bradley English, John Fennessey, Raymond Foiles, Joseph Gabriele, Peter Gonzales, Scott Greisman, Glen Hagen, Matthew Higgins, Christina Iannuzzi, Henry Kafka, Michael Kelly, Gerard Kleinfelder, Ronald Lozito, James Maloney, Eugene McLaughlin, Charles Monfasani, Michael O'Rourke, Anthony Racioppo, George Ritter, Terry Santiago, Edward Scharfberg, Kevin Scheid, William Tannhauser, Edward Tighe and Michelle Tighe, are not parties to the present litigation, because the issues raised herein do not affect any of their rights or interests.

An appeal to the United States Court of Appeals for the Second Circuit followed. In their appeal, Petitioners, all New York City Police Officers, contended that, with due respect to the District Court below, the dismissal of their claims was erroneous, and should have been reversed, because their underlying convictions for purported violation of the regulations of the New York City Police Department, while they were off-duty, constituted violations of their rights under the First and Fourteenth Amendments.

In its order of September 22, 1995, the Court of Appeals noted that the District Court below:

> . . . found that "the administrative hearings met both the federal and state procedural requirements for preclusion." However, the court determined that "there is nothing in the record to indicate that Deputy Commissioner Koshetz considered whether plaintiffs' obstruction of traffic may have merely provided a pretext for retaliating against plaintiffs for the exercise of their First Amendment rights." The court then found that the plaintiffs had not "put forward concrete evidence from which a reasonable jury could conclude that they were disciplined because of their exercise of First Amendment rights." Accordingly, the district court granted partial summary judgment and dismissed the plaintiffs' claims.
>
> * * *
>
> The plaintiffs challenge the district court's determination that the defendants did not violate their constitutional rights. Having found that the plaintiffs did not set forth "concrete evidence from which a reasonable jury could conclude that they were disciplined because of their exercise of First Amendment rights," the district court determined that the plaintiffs failed to establish a retaliation claim under § 1983. We are in substantial agreement with the district court's findings and conclusions.

A copy of the Order of the Second Circuit dated September 22, 1995 is set forth as Appendix A.

OPINIONS BELOW

The Opinion and Order of the District Court below, dated July 13, 1995, which granted partial summary judgment, dismissing the claims of Petitioners, is set forth as Appendix B.

JURISDICTION

As stated above, the Order of the Court of Appeals affirming the Opinion and Order of the District Court, which granted partial summary judgment, dismissing the claims of Petitioners, was entered on September 22, 1995. According to Rule 13.1 of the United States Supreme Court Rules, this Petition for a Writ of Certiorari, having been filed within 90 days of September 22, 1995, is timely. Further, this Court's jurisdiction to review this case rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF CASE

Petitioners herein, New York City police officers, *while off duty* chose to exercise their First Amendment rights on September 16, 1992, at New York City Hall, to protest various actions and statements of the then Mayor of the City of New York, David N. Dinkins, and other high ranking city officials, including but not limited to the reorganization of the Civilian Complaint Review Board, then a unit within the New York City Police Department, to become a civilian agency of the City government.

Petitioners, along with thousands of other New York City police officers, viewed these actions and statements as denigrating and impugning the professional status of New York City police officers, and as an attempt to minimize their professional status and to lessen public respect for them and ultimately to make their jobs more perilous, more demanding and more stressful.

As part of a lawfully organized demonstration, Petitioners decided to express their grievances and to request redress of such grievances. By so doing, Petitioners were clearly exer-

cising a right guaranteed to them pursuant to the First Amendment of the United States Constitution, in that the subject matter of their grievance was clearly a public issue, to wit: the composition of the Civilian Complaint Review Board.

The political demonstration by Petitioners, as indicated in the record, was conducted on September 16, 1992. It should be noted that the record herein discloses no reports of injuries or property damage. It is admitted that at times the assembly was quite vocal and emphatic, but was always within the limits protected by the First Amendment, and did not differ materially from other demonstrations by other groups which had demonstrated their displeasure at actions of the New York City government by protest assemblies in the City Hall area.

Nonetheless, retribution followed. Petitioners were charged with having violated the New York City Police Department Patrol Guide, Section 104-1, page 3, paragraph 4, which states that the following conduct is prohibited: "Engaging in conduct prejudicial to good order, efficiency or discipline of the Department." The specifications as to Petitioners' alleged infractions were as follows:

> 1. Said [Petitioner, Command] at or about 1215 hours on September 16, 1992, during the Patrolmen's Benevolent Association rally held in the vicinity of City Hall, did wrongfully enter/and or leave the Brooklyn Bridge roadway causing an obstruction of vehicular traffic, without just cause to do so.
>
> P.G. 104-1, page 3, paragraph 4—CONDUCT
>
> 2. Said [Petitioner, Command] at or about 1215 hours on September 16, 1992, during the Patrolmen's Benevolent Association rally held in the vicinity of City Hall, was wrongfully present upon a vehicular roadway in the vicinity of the Brooklyn Bridge.
>
> P.G. 104-1, page 3, paragraph 4—CONDUCT

Petitioners pleaded not guilty to the Specifications and a joint hearing was held on May 17, 18, 19 and 26, 1993, before a Hearing Officer employed by the New York City Police Department, Deputy Commissioner RAE DOWNES KOSHETZ. Thereafter, in a Report and Recommendation dated July 26, 1993, the Hearing Officer determined and recommended to Respondent Police Commissioner that each Petitioner be found guilty of Specification No. 1 and not guilty of Specification No. 2.

The Hearing Officer also recommended to Respondent Police Commissioner that as to the penalty, each Petitioner forfeit ten vacation days. On August 2, 1993, Respondent Police Commissioner adopted and approved the recommendation of the Hearing Officer. It should be noted that the penalty of ten (10) vacation days is the monetary equivalent of some $1,000 to $1500 dollars, depending upon the particular officer's seniority and rate of pay. In addition, the fact of the guilty verdict is permanently carried in the officer's personnel folder, which reflects adversely upon his/her career in the New York City Police Department.

It should also be noted that the penalties Petitioners received are far beyond any penal law penalties that might have been imposed in a criminal court matter based on the same set of facts. It is beyond question that penalties of the magnitude imposed could only have been imposed because the Petitioners are police officers.

On or about May 13, 1993, Petitioners commenced an action in the United States District Court for the Southern District of New York, by filing a Verified Complaint, together with an Order to Show Cause for an Injunction and Temporary Restraining Order, alleging that their underlying convictions for purported violation of the regulations of the New York City Police Department, while they were off-duty, constituted violations of their rights under the First and Fourteenth Amendments, and that their alleged obstruction of

traffic merely provided a pretext for Respondents' true motivation, which was to retaliate against Petitioners for the exercise of their First Amendment rights by demonstrating against a change in the Civilian Complaint Review Board which had been proposed by the then Mayor of New York City.

On July 13, 1994, the United States District Court, Southern District of New York (Hon. PETER K. LEISURE, U.S.D.J.) dismissed the claims of Petitioners in response to a motion for partial Summary Judgment brought by Respondents. On September 22, 1995, the United States Court of Appeals for the Second Circuit affirmed said order.

REASONS FOR GRANTING THE PETITION

I. The Courts below erred in dismissing Petitioners' action, in that the motive for their discipline was the exercise of their First Amendment rights in demonstrating against the then Mayor's administration of the Police Department, rather than the minor traffic infraction which was stated by the administrative agency to be the basis for their discipline.

Petitioners respectfully submit that although the Federal Courts are precluded from re-examining the *factfinding* of the administrative agency which directed them to be disciplined, a Federal Court is empowered to review the *conclusions of law* contained in the decision of the Respondent Police Department in disciplining the Petitioners, pursuant to the rule stated by this Court in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). In that case, a Black employee of the University of Tennessee Agricultural Extension Service filed an administrative appeal from a notice of pending termination and, during pendency of administrative appeal, filed a complaint in the appropriate United States District Court alleging employment discrimination, and renewed his action on the pending Federal Complaint after an administrative law judge

issued a final order. The District Court entered judgment for the university, and the employee appealed. The Court of Appeals reversed, 766 F.2d 982 (6th Cir. 1985). Certiorari was granted, and this Court held that:

1. Unreviewed state administrative proceedings did not have preclusive effect on employee's Title VII discrimination claims;

2. Unreviewed state administrative proceedings did have a preclusive effect on employee's claims under reconstruction civil rights statutes (42 U.S.C. 1983 et seq.), explained more fully as follows:

3. When a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, Federal Courts in actions under the Reconstruction civil rights statutes must give the agency's *factfinding* the same preclusive effect to which it would be entitled in the State's courts.

In sum, in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) this Court held that a Federal Court which reviews a decision made by an administrative agency must give preclusive effect to the *findings of fact* made by the agency. Nowhere in *University of Tennessee v. Elliott* did this Court ever hold that Federal Courts are precluded from reviewing the *conclusions of law* made by the state administrative agency.

To the contrary, it is well-settled law, stated in numerous holdings of this Court, that a Federal Court must review the conclusions of law of a state administrative agency, insofar as those conclusions deal with the Federal Constitutional rights of a party.

Thus, as long ago as 1938, this Court concluded in *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938), that there is jurisdiction for a Federal Court to review the conclusions of law

of a state administrative agency, insofar as those conclusions deal with the Federal Constitutional rights of a party.

A similar conclusion was reached by this Court, with respect to the conclusions of law of a State Court as to the Federal Constitutional rights of a party, in *Thomas v. Collins*, 323 U.S. 516, 529-530, (1945), in which this Court held that a state law requirement that had been upheld by the Texas State Supreme Court, requiring paid labor union organizers to register with Secretary of State and secure an "organizer's card" before soliciting members within the state, was violative of the First Amendment. Accordingly, the decision of the Texas State Supreme Court was reversed. See also *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943).

The District Court below correctly stated, at page 7 of the Opinion and Order appealed from, that:

> . . . there is nothing in the record to indicate that Deputy Commissioner Koshetz considered whether plaintiffs' obstruction of traffic may have merely provided a pretext for retaliating against plaintiffs for the exercise of their First Amendment rights.

Petitioners respectfully submit that, having correctly noted the lack of any indication in the record that Deputy Commissioner Koshetz even *considered* whether Petitioners' obstruction of traffic was merely a pretext for retaliatory action taken against Petitioners for the exercise of their First Amendment rights, the District Court below erred in failing to recognize that Petitioners were disciplined for the exercise of their First Amendment rights. In reaching this conclusion, it is respectfully submitted that the District Court below applied an inappropriate standard when it held, at pages 8-9 of the Decision and Order appealed from, that:

> Plaintiffs base their contention that their obstruction of traffic is a pretext for the disciplinary actions on the observation that protestors who have blocked traffic on

> the Brooklyn Bridge on previous occasions have generally gone unpunished. However, it is entirely plausible and permissible that defendants seek to hold police officers to a higher standard of conduct than ordinary citizens with respect to their off duty activities.

Petitioners submit that the courts below failed to properly distinguish between those cases which hold that a federal court must give a state court judgment the same "preclusive effect" the judgment would have under the law of the state in which the judgment was rendered, or those that hold that collateral estoppel bars a person from relitigating, in the Federal Courts, those issues of fact decided by a state administrative agency, and Petitioners' contention that the Federal Courts have the authority to re-examine a conclusion of law reached by a state administrative agency which deals with their First Amendment Rights.

Petitioners herein did not seek review by the District Court of the "fact-finding" of the state administrative agency. Rather, Petitioners sought review of the conclusion of law that their First Amendment Rights were not violated by the imposition of a penalty for "conduct unbecoming an officer" premised upon their allegedly disrupting vehicular traffic while engaged in an off-duty demonstration on a matter of public concern, to wit: the composition of the New York City Police Department's Civilian Complaint Review Board. Inherent in this question is the issue of the Respondents' motivation in disciplining Petitioners; were they disciplined for allegedly disrupting vehicular traffic, or because they publicly expressed a viewpoint contrary to that of the then mayor?

In this regard, Petitioners cannot overstress the statement, at page 7 of the Opinion and Order appealed from, that:

> . . . there is nothing in the record to indicate that Deputy Commissioner Koshetz considered whether plaintiffs' obstruction of traffic may have merely pro-

vided a pretext for retaliating against plaintiffs for the exercise of their First Amendment rights.

Petitioners respectfully submit that, having correctly noted the lack of any indication in the record that Deputy Commissioner Koshetz even *considered* whether Petitioners' obstruction of traffic was merely a pretext for retaliatory action taken against them for the exercise of their First Amendment rights, the doctrine of collateral estoppel may not be used to deprive Petitioners of a review of this issue in the Federal Courts, including this Court, and further, that the Courts below erred in failing to afford Petitioners judicial review of their claim that they were disciplined for the exercise of their First Amendment rights.

As a necessary consequence of the failure of the Administrative Law Judge, to even consider whether Petitioners' obstruction of traffic was merely a pretext for retaliatory action taken against them for the exercise of their First Amendment rights, Petitioners submit that they are not precluded by the doctrine of collateral estoppel. In *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, (1984), the New York State Court of Appeals made clear that under New York law, collateral estoppel only applies where the issue was actually determined in the state administrate proceeding.

Where, as in the case at bar, there is no indication that the state administrative law judge even considered the issue that the alleged obstruction of traffic was a mere pretext for disciplining the Petitioners for the exercise of their First Amendment Rights, the doctrine of collateral estoppel does not apply to preclude a Federal Court from considering that issue. See also *Mendoza v. SSC & B Lintas, New York*, 799 F.Supp. 1502, 1509 (S.D.N.Y. 1992), which reiterated the rule that, for collateral estoppel to have effect, the administrative holding must have considered the issue raised in the Federal Court, and ruled upon it.

In sum, since there is no indication that the state administrative law judge even considered the issue that the alleged obstruction of traffic was a mere pretext for disciplining the Petitioners for the exercise of their First Amendment Rights, the doctrine of collateral estoppel cannot be applied to preclude the District Court from considering that issue.

Moreover, Petitioners respectfully submit that it was error for the District Court below to have granted summary judgment dismissing Petitioners' claims, where the issue of Respondents' motive in disciplining them was called into question in their Complaint. It has been regularly held that summary judgment is inappropriate where the issue of the governmental employer's motive is in question.

See in this regard *Piesco v. City of New York, Dept. of Personnel*, 933 F.2d 1149 (2d Cir. 1991), in which it was held that "summary judgment is inappropriate when 'questions of motive predominate in the inquiry about how big a role the protected behavior played in' the employment decision." See also *Frank v. Relin*, 1 F.3d 1317, (2d Cir. 1993), in which the Second Circuit held that ". . . the question of Relin's [the employee's ultimate supervisor] motivation could not be decided as a matter of law."

Thus, as has been amply demonstrated above, the Courts below were not precluded from considering, and should have considered, the issue of whether the alleged obstruction of traffic was a mere pretext for disciplining off-duty police officers for the exercise of their First Amendment Rights. Upon such consideration, the Courts below should have concluded that summary judgment was inappropriate where Respondents' motivation in disciplining Petitioners was at issue, particularly since the issue of motivation was concededly not examined at the administrative hearing. Accordingly, the Opinion and Order of the District Court below should have been reversed.

That the method Petitioners chose to express their disapproval of the local government's action involved physical acts ancillary to speech presents no difficulty to Petitioners' position. See *Texas v. Johnson*, 491 U.S. 397 (1989), in which this Court had occasion to define the concept of free speech and free expression as including conduct imbued with elements of communication. See also in this regard *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Schacht v. United States*, 398 U.S. 58 (1970);*Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *United States v. Grace*, 461 U.S. 171 (1983); and in general, *Spence v. Washington*, 418 U.S. 405, (1974).

As will be amply demonstrated below, in dealing with the First Amendment rights of off-duty police officers, the District Court below failed to apply the appropriate test to determine whether, under the circumstances presented, it was permissible for the Respondents to hold off-duty police officers to a higher standard of conduct than ordinary citizens. Accordingly, the Opinion and Order of the District Court below should have been reversed.

II. The District Court below erred in failing to apply the Pickering-Connick test to determine whether the First Amendment rights of the Petitioners outweighed the interest of the Respondents to maintain an efficient police force.

Petitioners respectfully submit that the District Court below erred in failing to apply the test prescribed by this Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), as further explained in *Connick v. Myers*, 461 U.S. 138 (1983). As stated by this Court in *Connick*, the test is as follows:

> For at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Keyishian v. Board of

> Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); Branti v. Finkel, 445 U.S. 507, 515-516, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980). Our task, as we defined it in Pickering, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S., at 568, 88 S.Ct., at 1734.

Petitioners respectfully submit that the District Court below failed to apply the "balancing test" prescribed in *Connick* when it held, at page 9 of the Decision and Order appealed from, that:

> If a government, then, may legitimately restrict the content of it[s] employees' speech, there can be little doubt that the government may seek to hold police officers to a more punctilious observation of its traffic laws. It is self-evident that the effective operation of a police force is frustrated by the public indiscretions of its members in disobeying the laws they are commissioned to enforce.

Petitioners would have no quarrel with the above statement if it were applied to the actions of police officers while on duty, or even to police officers who elect to take police action, as they are permitted to do by New York State law, while off-duty. In the case at bar, however, the Petitioners were off-duty, and were not engaged in taking police action. Instead, Petitioners were engaged in the exercise of their First Amendment rights, a right every citizen enjoys.

This Court, in *Connick*, mandated a balancing test, in which the First Amendment rights of the employees is balanced

against the needs of the local government, as an employer, "in promoting the efficiency of the public services it performs through its employees."

Petitioners respectfully submit that, for the District Court below to have held, without any evidentiary showing at all, that "*it is self-evident* that the effective operation of a police force is frustrated by the public indiscretions of its members in disobeying the laws they are commissioned to enforce", in the context of Petitioners' off-duty exercise of their First Amendment rights, constituted a failure to apply the test contemplated by this Court in *Connick*. By contrast, the District Court below held, at page 7 of the Decision and Order appealed from, that the Petitioners "have not put forward concrete evidence from which a reasonable jury could conclude that they were disciplined because of their exercise of First Amendment rights."

In essence, the District Court below held that the Petitioners did not evince *sufficient* evidence to show that they were disciplined for the exercise of their First Amendment rights, but that Respondents were not required to put forward *any evidence at all* to show that the exercise of Petitioners' First Amendment rights while off-duty would have a destructive effect upon "promoting the efficiency of the public services it performs through its employees", because the District Court below found that proposition to be "self-evident."

Respectfully, Petitioners challenge the opinion of the District Court below that "it is self-evident that the effective operation of a police force is frustrated by the public indiscretions of its members in disobeying the laws they are commissioned to enforce." Petitioners were off-duty at the time in question. They were not wearing their Police Department uniforms, or any other indicia of their status as New York City Police Officers. The demonstration took place in a public street, and was open to any member of the general public who chose to attend. Indeed, the speakers who were part of

the event included then mayoral candidate Rudolph Giuliani, now the Mayor of New York City, and Member of Congress Susan Molinari; persons who would, and did, reasonably command the attention of members of the general public other than off-duty police officers. If the demonstrators obstructed traffic at a certain point, due to the failure of the Police Department supervisors who were present to direct the on-duty policing of the event to provide adequate space on sidewalks for the larger-than-anticipated crowd of people, civilians and off-duty police officers, who attended, how precisely did this have a negative effect upon the ability of the New York City Police Department to promote "the efficiency of the public services it performs through its employees"?

Remarkably, this critical question was never even asked, let alone answered, by the District Court below, other than to state that "it is self-evident that the effective operation of a police force is frustrated by the public indiscretions of its members in disobeying the laws they are commissioned to enforce." Petitioners submit that the *Pickering–Connick* rule requires the Court to demand proof from the government agency to demonstrate the negative effect upon "the efficiency of the public services it performs through its employees." As this was not done in the case at bar, the decision of the District Court below should have been reversed.

Further light is shed upon issue of the balancing of the rights of police officers against the public mandate for an effective police force by a number of decisions of this Court, including *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), in which this Court held, at 385 U.S. 499-500:

> We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.

* * *

> Assertion of a First Amendment right is still another. Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; Lamont v. Postmaster General, 381 U.S. 301, 305—306, 85 S.Ct. 1493, 1495—1496, 14 L.Ed.2d 398.

In sum, the circumstance that Petitioners were off-duty police officers does not cause them to lose their First Amendment rights. In *Connick v. Myers*, 461 U.S. 138 (1983), this Court was called upon to discuss the particular free speech rights of governmental employees. This Court, in explaining its reasoning, employed the same test as it had previously used in *Spence v. Washington*,418 U.S. 405 (1974), *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *Texas v. Johnson*, 491 U.S. 397 (1989).

This Court examined the claimed manifestation of expression in its context to determine whether it is indeed "communicative" in nature and then employed a test which balanced the government's legitimate interest with that of the individual. In determining a public employee's rights of free speech, this Court mandated that the task of the District Court is to arrive at a balance between interests of the employee as a citizen, in his commenting upon matters of public concern, on the one hand, and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees, on the other.

According to *Connick*, where a public employee's expressions address a matter of public concern, he is entitled to protection from a Federal Court to prevent his discharge or disciplining for expressing views which are unpopular with his superiors. Whether or not a given example of this expression is worthy of such protection must be determined by the content, form and context of the expression, as well as an

appropriate assessment of any competing interests by the employer, from the facts and circumstances taken as a whole.

In the present controversy, it is apparent that the part of test relating to the content, form and context of the expression has been met. The issue of the form and structure of New York City's Civilian Complaint Review Board is, beyond question, a matter of public concern. The public is entitled to be informed of all aspects of this controversy.

Petitioners are accordingly entitled to set forth their views, entirely legitimate in nature, that the proposed alteration of the form and structure of the Civilian Complaint Review Board would have a distinct impact upon employment rights of individual police officers on the one hand, and upon the increased ability of criminals to avoid accounting to the Courts for their actions on the other.

Petitioners submit that the public demonstration by which they expressed their views had a minimal impact upon the day-to-day functioning of the Police Department. The demonstration occurred in a confined area, which was easily controlled by existing law enforcement resources. The demonstrators were all off-duty. Police Officers who were on-duty were under direct orders and supervision, and there was no reported instance of any failure by on-duty police officers to carry out their instructions from their superiors.

It is beyond dispute that the government of the City of New York, as well as superiors in the New York City Police Department, were very unhappy with the fact of the demonstration. It is also beyond dispute that the commencement of the disciplinary case against the Petitioners was a manifestation of this displeasure. This Court ought not countenance a circumstance where senior politicians in City government and senior members of the Police Department subvert the administrative and judicial processes in order to exact retribution upon rank-and-file police officers exercising due Constitutional rights to free speech. See in this regard the opinion

of this Court in *Waters v. Churchill*, ___ U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

In *Rankin v. McPherson*, 483 U.S. 378 (1987), this Court assessed this impact of governmental interest upon a given individual's claims of free speech. In *Rankin*, a clerical employee in a County Constable's Office in Texas made certain remarks, disagreeing with the policies then in effect by the President of the United States. For uttering her remarks, the employee was terminated. This Court held the individual's right, under the First Amendment, to freely express a statement which was political and public in nature, made in the context of a law enforcement office, outweighed the employer's rights.

In *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1994) the Eighth Circuit stated that a city fire and police dispatcher who made statements critical of city officials and policies had paramount First Amendment protection, which were proof against attack by that city.

By contrast, when the controversy involves a discussion of issues more narrow than ones involving the general public, the right of the employer, whether public or private, is controlling. See, e.g., *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993); *Youker v. Schoenenberger*, 22 F.3d 163 (7th Cir. 1994); *Morgan v. Ford*, 6 F.2d 750 (11th Cir. 1993); *Hartman v. Board of Trustees*, 4 F.3d 465 (7th Cir. 1993) *Holland v. Rimmer*, 25 F.3d 1251 (4th Cir. 1994); *Lesher v. Reed*, 12 F.3d 148 (8th Cir. 1994).

The free speech context of the present controversy appears to be quite similar to *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, this Court held that the question of whether a school system required additional funds is a matter of legitimate public concern. It was held to be an issue on which the judgment of the school administration could not be taken as conclusive. Here, the issue of whether or not the investigative and disciplinary powers, as well as the

composition of the Civilian Complaint Review Board is, similarly, a matter of legitimate public concern.

For all of the above reasons, it becomes readily apparent that the Respondents improperly disciplined the Petitioners. Clearly, such a situation can have no other effect than to chill the due exercise of Constitutional rights by Petitioners, and others similarly situated. It places said Petitioners in a situation where they must choose between the exercise of their First Amendment rights, while off-duty, which would expose them to disciplinary sanction or worse, or refraining from such exercise, thereby avoiding any sanction. There could scarcely be any greater intimidation to the exercise of free expression or speech.

It is virtually beyond the need for citation to state that it is a well-settled principle of law that employment in the public sector may not be made subject to conditions which may infringe upon a public employee's Constitutionally-protected right of freedom of expression, see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

In the case at bar, Petitioners were disciplined for "conduct unbecoming a New York City Police Officer", as noted by the District Court below at page 4 of the Decision and Order appealed from. Petitioners respectfully submit that there could hardly be a more egregious example of a failure of a local government regulation to abide by this Court's admonition, in *Keyishian*, that "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." The Patrol Guide regulation in question provides *absolutely no specificity* as to what is being proscribed. Instead, it stands as a "catch-all" regulation under which the Respondents may discipline a police officer for any conduct the local government may consider offensive. Where such a non-specific regulation comes in conflict with the rights of the Petitioners under the First Amendment, the regulation must fail, and accordingly,

the disciplinary action taken under said regulation should have been reversed by the Courts below.

In this frame of reference, the court is referred to *American Federation of Government Employees, AFL-CIO, et al. v. Pierce, et al.*, 586 F.Supp. 1559 (D.C. D.C. 1984). That case involved the prohibition by the Veterans Administration, a Federal agency, against wearing political buttons while on duty. The court reviewed the Veterans Administration's regulations regarding their restrictions relating to the wearing of political buttons, and concluded that the Veterans Administration could not Constitutionally prohibit the wearing of political campaign buttons by its employees while they are on-duty. Petitioners therefore submit that, *a fortiori* the Police Department of the City of New York cannot prohibit police officers from taking part in a political demonstration while they are *off-duty*. Such a prohibition is clearly offensive to the First Amendment, and under these circumstances, the Court of Appeals should have reversed the Decision and Order appealed from.

It is respectfully submitted that the alleged disruption of vehicular traffic on the Brooklyn Bridge by Petitioners, while off-duty, for a period of time admitted by Respondents to have been perhaps 15-30 minutes, cannot be alleged to have impaired the regular operation of the New York City Police Department in any of the ways specified by this Court in *Rankin*, as a matter of law. See also the opinion of this Court in *Pickering v. Board of Ed.*, 391 U.S. 563, (1968), at 571-573.

The case at bar presents an exact parallel to the situations in *Rankin* and *Pickering*, in that Petitioners were demonstrating their difference of opinion with the City's administration with respect to the proper composition of the New York City Police Department's Civilian Complaint Review Board, clearly an issue of general public interest. Accordingly, the holdings in *Rankin* and *Pickering* would require the

Respondents to demonstrate that Petitioners' conduct, while off-duty, impeded the proper performance of their daily duties as New York City Police Officers when they returned to duty, or that Petitioners' conduct interfered with the "regular operation" of the New York City Police Department. Clearly, Respondents did not so demonstrate in the District Court below. Equally clearly, Respondents could not so demonstrate. Consequently, the opinion of the District Court below should have must been reversed.

It may be noted that in *Jeffries v. Harleston*, 21 F.3d 1238, 1246 (2d Cir. 1994), the Second Circuit held that the governmental employer may escape liability for violation of the employee's First Amendment Rights only where: ". . . the employee's conduct interfered with the 'effective and efficient fulfillment of [defendants'] responsibilities to the public.' Frank, 1 F.3d at 1329 (quoting Connick, 461 U.S. at 150, 103 S.Ct. at 1691)."

In exposition of what the Second Circuit meant by "interference" with the fulfillment of the governmental employer's responsibilities to the public, the opinion in *Jeffries* states, at 21 F.3d 1246-1247:

> Nor have the defendants shown that Jeffries' speech interfered with CUNY's operation. See Frank, 1 F.3d at 1329. Generally, *interference in this context entails impairing employer discipline, causing disharmony among co-workers, disrupting close working relationships where loyalty and confidence are essential, failing to perform one's duties, or frustrating the regular operation of the government enterprise in question.* See Pickering, 391 U.S. at 570-73, 88 S.Ct. at 1735-37.
>
> * * *
>
> *. . . the government must show the statements "actually undermined the effective and efficient operation" of the employee's department.* Piesco, 933 F.2d at 1159.

> Because, as we held above, Jeffries' speech substantially concerned public issues, *the defendants shoulder the weightier burden of showing that the speech caused substantial disruption at CUNY.*
>
> * * *
>
> In short, to rebut Jeffries' prima facie case, the defendants must show substantial interference. We find that the defendants have provided meager evidence at best that Jeffries' speech had any real *disruptive effect on CUNY operations*, and thus, have fallen short of their burden. [Emphasis supplied.]

It is thus clear that, in the case at bar, to have prevailed on their motion for partial summary judgment, Respondents should have been required by the District Court below to have demonstrated that Petitioners' conduct had a real disruptive effect upon the operations of the New York City Police Department. They did not do so in the District Court below, and it is respectfully submitted that they could not have done so, as a matter of law.

In an earlier case in which the Second Circuit made a similar ruling, *Piesco v. City of New York*, 933 F.2d 1149 (2d Cir. 1991), the Court held at 933 F.2d 1259-1260, that ". . . the government is required to demonstrate interference with the efficient functioning of the workplace", and has the ". . . burden of proving harm to the efficient functioning of . . . [the agency in question].

In the case at bar, the Petitioners were demonstrating on a matter of clear public concern, and consequently, under *Connick* and its progeny, the Respondents had the burden of demonstrating that the conduct of Petitioners interfered with the efficient operation of the New York City Police Department. Respondents did not do so below, either in the state administrative proceeding or in the District Court in support of their motion for partial summary judgment. Accordingly,

the decision of the District Court below should have been reversed.

III. The Courts below failed to take proper account of the fact that Petitioners were off-duty at the time of the incident in question, and that while off-duty, they are entitled to enjoy the same rights under the First Amendment as any other citizen, including the right to engage in "symbolic speech."

In a remarkable position for Respondents to take, given their usual position with regard to the assumption of civil liability for the taking of police action by New York City Police Officers while off-duty, Respondents argued below that "Police officers . . . are, for all practical purposes, considered *always* to be on duty."

This position should be contrasted with the fact that the City of New York has obtained from the New York State legislature a special statute, applicable *only* to the City of New York, to wit: N.Y. General Municipal Law § 50-k, which states, *inter alia*:

> 3. The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller, *provided that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment and in the discharge of his duties* and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee. [Emphasis supplied.]

Under the relevant case law, the City of New York reserves to itself the right, in the first instance, to determine whether an employee's acts were committed within scope of his public employment and in discharge of his duties; *Williams v. City of New York*, 64 N.Y.2d 800 (1985). Where a police officer is off-duty, the City of New York almost invariably takes the position that the actions taken by an off-duty officer was not "within the scope of his public employment and in the discharge of his duties." See, e.g. *Turk v. McCarthy*, 661 F.Supp. 1526 (E.D.N.Y. 1987); *Kelly v. City of New York*, 692 F.Supp. 303 (S.D.N.Y. 1988); *Rivera v. Laporte*, 120 Misc.2d 733, (Sup. Ct. N.Y. Co. 1983).

In the case at bar, the Respondents purport to have the right to hold off-duty police officers to a "higher standard" than ordinary citizens, and to be able to Constitutionally discipline them under circumstances in which ordinary citizens would not have been punished at all, or could at worst have been given a citation for obstructing traffic, which carries a maximum fine of $50.00, pursuant to Title 34, Rules of the City of New York, § 3-05(b), assuming the area the Petitioners allegedly blocked was defined as a "restricted area", or $35.00 if it was not so defined.

Petitioners respectfully submit that by so doing, Respondents are engaged in precisely the form of conduct which is prohibited by the First and Fourteenth Amendments, i.e. selecting a group of individuals for a form of prosecution, in this case an administrative penalty amounting to a fine of approximately $1,500.00 apiece, (Respondents conceded the value of the administrative penalty to have been "nearly $1,000.00" in the Courts below) for exercising their right to publicly protest a local government decision of which they did not approve, where other citizens would not have been punished at all, or could at most have been fined $50.00.

Taking the numbers most favorable to Respondents, it is their position that they can Constitutionally single out off-

duty Police Officers for a $1,000.00 fine under circumstances in which any other citizen could have been fined, at most, $50.00 for the same act. In short, Respondents' position is that *off-duty* Police Officers can be Constitutionally fined *twenty times* as much as any other citizen, for engaging in the same act, simply by virtue of their status as Police Officers. Petitioners respectfully disagree, and submit that such selective prosecution violates the Fourteenth Amendment, see Point IV, below. Accordingly, the decision of the District Court below should have been reversed.

IV. Respondents violated Petitioners' rights to equal protection under the Fourteenth Amendment, by disciplining them for off-duty activities under circumstances in which persons other than police officers would not have been punished at all, or at most, could have been subjected to a fine amounting to less than 5% of the penalty imposed on petitioners.

The opinion of the District Court below states, at pages 8-9 of the Decision and Order appealed from, that:

> Plaintiffs base their contention that their obstruction of traffic is a pretext for the disciplinary actions on the observation that protestors who have blocked traffic on the Brooklyn Bridge on previous occasions have generally gone unpunished. However, it is entirely plausible and *permissible that defendants seek to hold police officers to a higher standard of conduct than ordinary citizens with respect to their off duty activities.* [Emphasis supplied.]

Petitioners respectfully submit that while it may be Constitutionally permissible for police officers to be held to a "higher standard of conduct than ordinary citizens" with respect to their *on duty* activities, it is not Constitutionally permissible to do so with respect to their *off-duty* activities. Petitioners further submit that for the City of New York and

its Police Department to do so is openly and clearly violative of the Fourteenth Amendment, in that it singles out a certain class of persons, to wit, police officers, for deprivation of their First Amendment rights, while they are *off-duty*, i.e. at a time when no legitimate interest of local government exists which would allow a Court, in applying a balancing test, to conclude that the municipality's interests outweigh the First Amendment rights of the individuals in question.

In addition to its more common application to cases of racial or gender discrimination, the Fourteenth Amendment's proscription on the deprivation of any person's right to equal protection of the law has been specifically applied to First Amendment situations. See *Wayte v. U.S.*, 470 U.S. 598, (1985); *United States v. Berrios*, 501 F.2d 1207, (2d Cir. 1974); *United States v. Crow Dog*, 339 S.Supp. 228, 234, *aff'd* 532 F.2d 1182 (8th Cir. 1976), *cert. den.* 430 U.S. 929 (1977); *(Elizabeth) Smith v. United States*, 460 A.2d 576, (D.C. Cir. 1983); *U.S. v. Blitstein*, 626 F.2d 774, (10th Cir. 1980) *cert. den.* 449 U.S. 1102 (1981); *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979); *United States v. Torquato*, 602 F.2d 564 (3d Cir. 1979).

In the case at bar, the Respondents have enacted a regulation which, in its application to the Petitioners, has clearly been used to retaliate against them for their exercise, while off-duty, of their First Amendment rights to protest the decision of the local government to, *inter alia*, substitute an all-civilian Complaint Review Board for the previous Police Departmental Board. Accordingly, it is respectfully submitted that the administrative tribunal's decision, which found Petitioners guilty of "conduct unbecoming an officer" for their exercise of their First Amendment Rights, while off-duty, under circumstances in which "ordinary citizens" would not have been prosecuted, should not have been allowed to stand.

In reversing the decision of the District Court, the Fourth Circuit stated in *United States v. Crowthers*, 456 F.2d 1074, 1079 (4th Cir. 1972), under circumstances remarkably similar to those presented by the case at bar:

> What the government has done here is to undertake to suppress a viewpoint it does not wish to hear under the guise of enforcing a general regulation prohibiting disturbances on government property. In choosing whom to prosecute, it is plain that the selection is made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused. This is especially clear as to the services in June of 1970, since it appears the defendants were informed by Regional Counsel of the General Services Administration there was no way they could conduct services in the concourse without arrest. We hold the government may not enforce or fail to enforce 41 C.F.R. s 101-19.304 according to whether it agrees with the views expressed.

See also *United States v. (James) Smith*, 354 A.2d 510, (D.C. Cir. 1976); *United States v. Falk*, 479 F.2d 616, (7th Cir. 1973); *Gold Cross Ambulance v. City of Kansas City*, 538 F.Supp. 956 (W.D. Mo. 1982), *aff'd* 705 F.2d 1005 (8th Cir. 1983); *Dixon v. District of Columbia*, 394 F.2d 966, (D.C. Cir. 1968).

In the case at bar, the Petitioners, by administrative regulation, purport to have the right to hold off-duty police officers to a "higher standard" than ordinary citizens, and to be able to Constitutionally discipline them under circumstances in which ordinary citizens would not be punished.

Petitioners respectfully submit that by so doing, Respondents are engaged in precisely the form of conduct which is prohibited by the First and Fourteenth Amendments, i.e. selecting a group of individuals for a form of prosecution, in

this case an administrative penalty amounting to a fine of up to approximately $1,500.00 apiece, for exercising their right to publicly protest a local government decision of which they did not approve. Accordingly, the decision of the District Court below should have been reversed.

CONCLUSION

For the reasons stated above, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Order of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 94-9241

Filed September 22, 1995

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of September, one thousand nine hundred and ninety-five.

PRESENT:

HON. JAMES L. OAKES,
HON. ROGER J. MINER,
HON. J. DANIEL MAHONEY,
Circuit Judges.

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc.; MICHAEL BONENFANT, NYPD Officer; PAUL CHIARAMONTE, NYC Police Officer; MICHAEL R. MILLER, NYC Police Officer; KEVIN MURPHY, NYC Police Officer; PAUL POLITO, NYC Police Officer; PAUL SANZONE, NYC Police Officer; THOMAS SHEEHAN, NYC Police Officer; DAVID TURNOF, NYC Police Officer; M. WNOROWSKI, NYC Police Officer,

Plaintiffs-Appellants,

NICHOLAS ABATE, New York City Police Officer; NICHOLAS ARNIOTES, NYPD Officer; JACK BOWDEN, NYPD Officer; JAMES BOYLE, NYPD Officer; ROBERT A. CASABURI, NYC Police Officer; PAUL CIORRA, NYC Police Officer; LAWRENCE P. COHEN, NYC Police Officer; ROBERTA CORRIGAN, NYC Police Officer; BRADLEY ENGLISH, NYC Police Officer; JOHN FENNESSEY, NYC Police Officer; RAYMOND FOILES, NYC Police Officer; JOSEPH GABRIELE, NYC Police Officer; PETER GONZALES, NYC Police Officer; SCOTT GREISMAN, NYC Police Officer; GLEN HAGEN, NYC Police Officer; MATTHEW HIGGINS, NYC Police Officer; CHRISTIANA IANNUZZI, NYC Police Officer; HENRY KAFKA, NYC Police Officer; MICHAEL P. KELLY, NYC Police Officer; GERARD KLEINFELDER, NYC Police Officer; RONALD LOZITO, NYC Police Officer; JAMES MALONEY, NYC Police Officer; EUGENE MCLAUGHLIN, NYC Police Officer; CHARLES MONFASINI, NYC Police Officer; MICHAEL O'ROURKE, NYC Police Officer; ANTHONY RACIOPPO, NYC Police Officer; GEORGE RITTER, NYC Police Officer; TERRY SANTIAGO, NYC Police Officer; EDWARD SCHARFBERG, NYC Police Officer; KEVIN SCHEID, NYC Police Officer; WILLIAM TANNHAUSER, NYC Police Officer; EDWARD TIGHE, NYC Police Officer; MICHELLE TIGHE, NYC Police Officer,

Plaintiffs,

—v.—

RAYMOND W. KELLY, as Police Commissioner of the Police Department of the City of New York; THE NEW YORK CITY POLICE DEPARTMENT,

Defendants-Appellees.

ORDER

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Plaintiffs-appellants appeal from a summary judgment entered in the United States District Court for the Southern District of New York (Spatt, J.) dismissing their claims, the claims of the remaining plaintiffs having been dismissed on stipulation.

On September 16, 1992, approximately 15,000 off-duty police officers and other persons took part in a demonstration near City Hall in New York City. The purpose of the demonstration was to protest against the perceived unfavorable attitude of the city government toward police officers and against new legislation that would change the format of the Civilian Complaint Review Board. During the demonstration, some of the protestors, including off-duty police officers, entered the vehicular roadways of the Brooklyn Bridge and obstructed traffic.

Following an investigation by the Internal Affairs Division of defendant-appellee New York City Police Department (the "NYPD"), fifty-three police officers were served with administrative charges as a result of their conduct at the demonstration. Nine of these officers (the "plaintiffs") were charged with engaging in "conduct unbecoming" a police officer, in violation of NYPD Patrol Guide Conduct Code § 104-1. The NYPD alleged that each plaintiff: 1) "did wrongfully enter/and or leave the Brooklyn Bridge roadway causing an obstruction of vehicular traffic;" and 2) "was wrongfully present upon a vehicular roadway in the vicinity of the Brooklyn Bridge." After the plaintiffs pleaded not guilty to the charges, the Trial Division of the NYPD conducted a hearing on May 17, 18, 19, and 26, 1993, before NYPD Deputy Commissioner of Trials, Rae Downes Koshetz.

At the hearing, the plaintiffs were represented by counsel and were given the opportunity to present evidence, testify, and call and cross-examine witnesses. In a Report and Recommendation dated July 26, 1993, Koshetz recommended that the plaintiffs be found guilty of having "wrongfully enter[ed]/and or [left] the Brooklyn Bridge roadway causing an obstruction of vehicular traffic."[1]

Koshetz determined that the plaintiffs had raised several defenses, including: 1) that the charges "are pretextual charges that violate the Respondents' First Amendment rights;" and 2) that "since other, non-police groups have occupied the Brooklyn Bridge in the past without being arrested or summonsed, these Respondents should not be punished either." Koshetz, however, rejected these defenses. She explained that the plaintiffs' First Amendment rights had not been violated because "[b]locking vehicular traffic on a bridge is a clear example of constitutionally unprotected conduct." Koshetz also stated that "[n]ot only are police officers required to refrain from conduct unbecoming to a New York City Police Officer even while off duty, . . . but also the discipline of police officers is special and different even from that of other civil service employees." Therefore, Koshetz recommended that each of the plaintiffs forfeit ten vacation days. On August 8, 1993, defendant-appellee Raymond W. Kelley, the Police Commissioner, approved Koshetz's Report and Recommendation.

The plaintiffs, along with the other officers who had been served with administrative charges, commenced the action giving rise to this appeal on May 13, 1993 against Kelly and the NYPD (collectively, the "defendants"). They alleged that the retaliatory actions taken by the defendants had infringed their rights of freedom of assembly, speech, and expression protected by the First and Fourteenth Amendments. They sought, *inter alia*, declaratory and injunctive relief enjoining the defendants from violating their constitutional rights.

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[1] Koshetz recommended that the plaintiffs be found not guilty of having been "wrongfully present upon a vehicular roadway in the vicinity of the Brooklyn Bridge."

On January 18, 1994, the defendants moved for partial summary judgment against the plaintiffs. By an Opinion and Order dated July 13, 1994, the court found that "the administrative hearings met both the federal and state procedural requirements for preclusion." However, the court determined that "there is nothing in the record to indicate that Deputy Commissioner Koshetz considered whether plaintiffs' obstruction of traffic may have merely provided a pretext for retaliating against plaintiffs for the exercise of their First Amendment rights." The court then found that the plaintiffs had not "put forward concrete evidence from which a reasonable jury could conclude that they were disciplined because of their exercise of First Amendment rights." Accordingly, the district court granted partial summary judgment and dismissed the plaintiffs' claims. Following the entry of a stipulation and order of voluntary dismissal of the remaining officers' claims, the plaintiffs filed a Notice of Appeal dated November 29, 1994.

Meanwhile, the plaintiffs had commenced an Article 78 proceeding, which was transferred to the Appellate Division, First Department, pursuant to New York Civil Practice Law and Rules § 7804(g), by a February 24, 1994 order of the Supreme Court, New York County. On May 9, 1995, by a Decision and Order, the Appellate Division unanimously confirmed the determination of the Police Commissioner, and dismissed plaintiffs' Article 78 proceeding.

On this appeal, defendants requested that we refrain from "reviewing plaintiffs' constitutional claims until petitioners receive a final determination on these very same claims from the State's Appellate Court." The Appellate Division now has entered its Decision and Order, and there no longer is any reason to delay our review.

The plaintiffs challenge the district court's determination that the defendants did not violate their constitutional rights. Having found that the plaintiffs did not set forth "concrete evidence from which a reasonable jury could conclude that they were disciplined because of their exercise of First Amendment rights," the district court determined that the

plaintiffs failed to establish a retaliation claim under § 1983. We are in substantial agreement with the district court's findings and conclusions.

In any event, we must apply principles of res judicata in this appeal in light of the state court proceedings that were concluded after the district court judgment. "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). In New York, the state courts have adopted a

> "transactional approach" to res judicata, holding that if claims arise out of the same "factual grouping" they are deemed to be part of the came cause of action and the later claim will be barred without regard to whether it is based upon different legal theories or seeks different or additional relief.

Davidson v. Capuano, 792 F.2d 275, 278 (2d Cir. 1986) (citations omitted).

In her Report and Recommendation, Koshetz rejected the plaintiffs' contention that the NYPD's charges were pretextual and violated their constitutional rights. The Appellate Division confirmed this determination in the Article 78 proceeding. On appeal, the plaintiffs again argue that the defendants retaliated against them and thereby infringed their rights under the First and Fourteenth Amendments. Since these claims arise out of the same "factual grouping" as the claims put forward in state court, res judicata bars their assertion of these allegations before this court.

/s/ HON. JAMES L. OAKES
HON. JAMES L. OAKES,

/s/ HON. ROGER J. MINER
HON. ROGER J. MINER,

/s/ HON. J. DANIEL MAHONEY
HON. J. DANIEL MAHONEY,
Circuit Judges.

APPENDIX B

Order of the United States District Court For the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 CIV. 3247 (PKL)

PHIL CARUSO, as President of the Patrolmen's Benevolent Association of the City of New York, Inc., et al.,

Plaintiffs,

—against—

RAYMOND W. KELLY, as Police Commissioner of the Police Department of the City of New York and the POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Defendants.

APPEARANCES

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Counsel for Defendants

OPINION AND ORDER

LEISURE, *District Judge*:

This is an action for a declaratory judgment and injunctive relief brought pursuant to 28 U.S.C. § 2201, 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. Plaintiffs claim that they were subjected to retaliatory disciplinary actions in violation of their First Amendment rights. Defendants have fully prosecuted the disciplinary charges against plaintiffs Thomas Sheehan, Kevin Murphy, David Turnof, Paul Polito, Michael Bonenfant, Paul Chiaramonte, Miroslaw Wnorowski, Michael Miller and Paul Sanzone (the "instant plaintiffs") and have now moved for partial summary judgment dismissing their claims. For the reasons discussed below, defendants' motion is granted and the claims of these plaintiffs are dismissed.

I. STANDARD FOR SUMMARY JUDGMENT

"Summary judgment may be granted if, upon reviewing the evidence in the light most favorable to the non-movant, the court determines that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Richardson v. Selsky*, 5 F.3d 616, 621 (2d Cir. 1993). "Only when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment by granted." *Cruden v. Bank of New York*, 957 F.2d 961, 975 (2d Cir. 1992); *accord Taggart v. Time, Inc.*, 924 F.2d 43, 46 (2d Cir. 1991).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and identifying which materials "it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once a motion for summary judgment is properly made, however, the burden then shifts to the non-moving party, which " 'must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson*, 477 U.S. at 250 (quoting Fed. R. Civ. P. 56 (e)). "Conclusory allegations will not suffice to create a genuine issue. There must be more than a 'scintilla of evidence,'

and more than 'some metaphysical doubt as to the material facts.' " *Delaware & Hudson Ry. co. v. Conrail*, 902 F.2d 174, 178 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)); *accord Western World Ins. Co. v. Stack Oil, Inc.*, 922 F.2d 118, 121 (2d Cir. 1990) ("The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture.") (quotations and citations omitted).

II. FACTS OF THE CASE

Applying the above principles, the facts of this case are as follows. The instant plaintiffs are active members of the New York City Police Department (the "NYPD"). On September 16, 1992, plaintiffs attended a demonstration organized by the Patrolmen's Benevolent Association to protest the political actions and statements of Mayor David Dinkins regarding the NYPD. The demonstration was observed and photographed by members of the Internal Affairs Department of the NYPD. In January of 1993, the instant plaintiffs were identified by means of these photographs and were each charged with violating the NYPD Patrol Guide Conduct Code § 104-1, by (i) wrongfully entering the Brooklyn Bridge roadway and causing an obstruction of vehicular traffic without just cause to do so, and (ii) being wrongfully present upon a vehicular roadway in the vicinity of the Brooklyn Bridge.

A hearing on the charges was held before Deputy Commissioner Rae Downes Koshetz in the NYPD Trial Division pursuant to Section 75 of the New York State Civil Service Law. Deputy Commissioner Koshetz found that each of the instant plaintiffs had wrongfully obstructed traffic on the Brooklyn Bridge roadway,[1] that these actions constituted conduct unbecoming a New York City Police Officer, and that each of the instant plaintiffs should be penalized by forfeiting

[1] The Deputy Commissioner found that they had not been wrongfully present on a nearby roadway.

10 days of paid vacation leave. On August 2, 1993, defendant Raymond Kelly approved the Deputy Commissioner's recommendation in its entirety.

III. DISCUSSION

"To establish a retaliation claim under section 1983, a plaintiff 'initially [must] show that [his] conduct was protected by the first amendment,' and that defendants' conduct was motivated by or substantially caused by his exercise of free speech." *Gagliarde v. The Village of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994) (quoting *Brady v. Town of Colchester*, 863 F.2d 205, 217 (2d Cir. 1988). Plaintiffs herein contend that were disciplined for criticizing Mayor Dinkins. Defendants maintain plaintiffs were instead disciplined for obstructing traffic and, moreover, that plaintiffs' claims in this action are precluded by Deputy Commissioner Koshetz's findings.

"[W]hen a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate oppportunity to litigate,' federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts." *University of Tennessee v. Elliott*, 478 W.S 788, 798 (1986) (quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)); *accord Fondel v. Grumman Aerospace Corporation,* 884 F.2d 657, 659 (2d Cir. 1989). New York courts give full preclusive effect to the fact-finding of state and municipal administrative agencies that have conducted hearings, provided that the party against whom preclusion is urged was given a "full and fair" opportunity to participate and the issue in the administrative decision-making process was the same as in the proceeding in which preclusion is sought. *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 501, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984); *see also Brugman v. City of New York*, 102 A.D.2d 413, 419, 477 N.Y.S.2d 636, 640 (1st Dep't 1984) (findings of N.Y.C. Employee Retirement System Medical Board are preclusive). A party opposing preclusion bears the burden of establishing the absence of a full and fair opportunity to par-

ticipate in the prior proceeding. *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 310 (1979). The party urging preclusion has the burden of proving that the issue in the administrative proceeding was the same upon which the party seeks preclusion. *Id.*

In the instant case, the administrative hearings met both the federal and state procedural requirements for preclusion. Plaintiffs were present at the hearing, were represented by an attorney, and were given an opportuinty to present evidence and cross-examine witnesses against them. The hearings resulted in a written decision with detailed findings of fact, conclusions of law, and recommendations. Thus, these hearings clearly had "the essential procedural characteristics of a court", and plaintiffs were given a "full and fair" opportunity to participate in them. *Elliott*, 478 U.S. at 798 n.6 (quoting Restatement (Second) of Judgments § 83 (1982)). *See generally Martin v. Malhoyt*, 830 F.2d 237, 264 (D.C. Cir. 1987) (Ginsburg, J.) (holding that an administrative hearing conducted by the Washington, D.C. Metropolitan Police Department constituted a "full and fair" opportunity consistent with the procedural requirements of due process as set forth in *Elliott*.)

Accordingly, this Court will give preclusive effect to Deputy Commissioner Koshetz's findings. These findings, however, do not lead inexorably to the conclusion that plaintiffs' First Amendment claims are without merit. The Court may of course only give preclusive effect to issues upon which Deputy Commissioner Koshetz made determinations. The record demonstrates that Deputy Commissioner Koshetz concluded plaintiffs had improperly obstructed traffic. However, there is nothing in the record to indicate that Deputy Commissioner Koshetz considered whether plaintiffs' obstruction of traffic may have merely provided a pretext for retaliating against plaintiffs for the exercise of their First Amendment rights. Thus, Deputy Commissioner Koshetz's findings leave open the question of whether the disciplinary

actions were "motivated by or substantially caused by [plaintiffs'] exercise of free speech." *Gagliardi*, 18 F.3d at 194.

Turning to this question, the Court nonetheless finds that defendants' motion for summary judgment may be granted. A party moving for summary judgment meets his burden under Rule 56 of the Federal Rules of Civil Procedure by pointing to the absence of evidence supporting an essential element of the non-moving party's claim. *Celotex*, 477 U.S. at 323. In the instant case, plaintiffs have not put forward concrete evidence from which a reasonable jury could conclude that they were disciplined because of their exercise of First Amendment rights. In essence, plaintiffs contend that because the disciplinary proceedings at issue arose out of an event at which plaintiffs were criticizing Mayor Dinkins, a jury could infer that these disciplinary actions were taken in retaliation for this criticism. *Cf. Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464 (2d Cir. 1989) (to make prima facie case under title VII, plaintiff must show he was discharged in circumstances giving rise to an inference of racial discrimination.) The Court would readily agree had the defendants not provided an independent reason for the disciplinary action arising out of this same event: the plaintiffs' obstruction of traffic. By demonstrating that a legitimate basis existed for disciplining plaintiffs,[2] defendants have rebutted the inference that plaintiffs sought to draw. Unless plaintiffs can point to evidence suggesting that this purported reason for the disciplinary actions is pretextual, summary judgment must be enterred against them. *Cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (once defendant in Title VII action has articulated legitimate nondiscriminatory reason for its personnel action, burden shifts to plaintiff to show this reason is pretextual).

Plaintiffs base their contention that their obstruction of traffic is a pretext for the disciplinary actions on the observation

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[2] The defendants have established that a legitimate basis for the disciplinary actions existed by showing that Commissioner Koshetz's findings that plaintiffs obstructed traffic should be given preclusive effect.

that protestors who have blocked traffic on the Brooklyn Bridge on previous occasions have generally gone unpunished. However, it is entirely plausible and permissible that defendants seek to hold police officers to a higher standard of conduct than ordinary citizens with respect to their off duty activities.[3] The First Amendment permits a government employer to restrict even the content of an employee's speech, though such restrictions would be impermissible with respect to ordinary citizens:

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. [For example, a governor may fire a deputy who is critical of his legislative program because] the governor and the governor's sttaff have a job to do, and the governor justifiable feels that a quieter subordinate would allow them to do this job more effectively.

Waters et al. v. Churchill et al., No. 92-1450, 1994 LEXIS 4104, at *28, (U.S. May 31, 1994) (O'Connor, J.; plurality opinion). If a government, then, may legitimately restrict the content of its employees' speech, there can be little doubt that the government may seek to hold police officers to a more punctilious observation of its traffic laws. It is self-evident that the effective operation of a police force is frustrated by the public indiscretions of its members in disobeying the laws they are commissioned to enforce.

Finally, while the Supreme Court has suggested that when the government takes a personnel action, it need not conduct the equivalent of judicial proceedings to establish a reason-

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[3] Under New York law, it is well established that municipal employer has the right to discipline its employees for actions occurring off duty and off the employer's premises ??? *Villanueva v. Simpson*, 69 N.Y.2d 1034, 1035, 511 N.E.2d 60, 61, 51 N.Y.S.2d 916, 917 (1987); *Hong v. Brown*, 577 N.Y.S.2d 817, 178 A.D. 2d 369 (First Dep't 1991).

able factual basis for its actions, *see Waters* at 13-14, that is exactly what the defendants have done in this case. Where, as here, the government has indeed demonstrated that a formal administrative proceeding, in which the employee was found to have engaged in conduct unprotected by the First Amendment, preceded the disciplinary action complained of, a plaintiff may not avoid summary judgment merely by baldly asserting that his protected speech was the real motivation for the disciplinary action. Rather, he must provide some evidence showing that the purported reason for the disciplinary action is pretextual or that the protected speech was the true motivation for the disciplinary action. Since plaintiffs have failed to provide such evidence, there is no basis upon which a reasonable jury could conclude that plaintiffs were disciplined for their exercise of free speech. Thus, summary judgment must be granted.

CONCLUSION

For the reasons stated above, this Court grants partial summary judgement dismissing the claims of plaintiffs Sheehan, Murphy, Turnof, Polito, Bonenfant, Chiaramonte, Wnorowski, Miller and Sanzone. The parties are advised to appear for a pre-trial status conference on September 23, 1994, at 2:00 p.m. in Courtroom 312.

SO ORDERED,

Dated: July 13, 1994
New York, New York

PETER K. LEISURE
U.S.D.J.